Supreme Court, U.S.
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No. 95-168

IN THE
Supreme Court of the United States
October Term, 1995

ANTHONY EDWARD KESTLER,
Petitioner,

v.

BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, *et al.*,
Respondents.

On Petition For Writ Of Certiorari
To The Fourth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Fourth Circuit properly applied the law of North Carolina in determining that Petitioner had no vested right to receive disability retirement benefits free of an earnings limitation prior to the enactment of legislative provisions imposing such a limitation.

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LIST OF PARTIES

A. Petitioner/Plaintiff: *Anthony Edward Kestler.*

B. Respondents/Defendants: *The Board of Trustees of the North Carolina Local Governmental Employees' Retirement System*, a body politic and corporate; *Dennis Ducker (in his official capacity)*, Director of the North Carolina Local Governmental Employees' Retirement System; and *Harlan E. Boyles (in his official capacity)*, Treasurer of the State of North Carolina and Chairman of the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System.

C. Additional Defendants Dismissed By The United States District Court Who Were Not Parties To The Appeal Before The United States Court Of Appeals For The Fourth Circuit: *The North Carolina Local Governmental Employees' Retirement System*, an agency of the State of North Carolina;* and *The State of North Carolina.*

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* Although Petitioner refers to the North Carolina Local Governmental Employees' Retirement System as "a corporation," the statute creating the Retirement System describes it as an entity having "the power and privileges of a corporation." N.C. GEN. STAT. § 128-22. The District Court properly determined that the Retirement System is an agency or instrumentality of the State of North Carolina. *Kestler v. North Carolina Local Governmental Employees' Retirement System*, 808 F. Supp. 1220, 1223 (W.D.N.C. 1992) (Petition A.22). Indeed, Kestler himself alleged that the Retirement System is an agency of the State of North Carolina (Complaint ¶ 4).

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No. 95-168

IN THE

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October Term, 1995

ANTHONY EDWARD KESTLER,

Petitioner,

v.

BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Fourth Circuit Court Of Appeals

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BRIEF IN OPPOSITION

The Respondents, the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, Dennis Ducker, and Harlan E. Boyles, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the United States Court of Appeals for the Fourth Circuit's opinion in this case. That opinion is reported at 48 F.3d 800 (1995) (Petition A.1-A.11)

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

Anthony Edward Kestler brought this action in the United States District Court for the Western District of North Carolina on July 12, 1991, seeking, *inter alia*, declaratory relief under 42 U.S.C. § 1983 and injunctive relief declaring the acts of the State of North Carolina and the several defendants violative of the United States Constitution in that they placed a limitation on the amount of outside earnings that plaintiff could receive without decreasing his disability benefits paid by defendant Board of Trustees (Complaint ¶¶ 3-25). Kestler claimed that this limitation could not be applied to him inasmuch as he was "vested" in the Retirement System prior to enactment of this limitation (*id.*)[1]

The defendants answered the complaint by denying that they had violated any constitutional right of Kestler's, by asserting various affirmative defenses, and by moving to dismiss the complaint on various procedural grounds (Answer ¶¶ 22, defenses 1-8).

On December 16, 1992, after a hearing on stipulated facts (*see* Petition A.35-A.58), the District Court, in an opinion reported at 808 F. Supp. 1220 (1992) (Petition A.16-A.34), ruled in favor of Kestler and enjoined defendants

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[1] In his Petition, Kestler refers to the defendants as "fiduciaries." The Record contains no finding of a fiduciary relationship between Kestler and the defendants, and the North Carolina Court of Appeals has specifically questioned whether the relationship between Kestler and the defendants can be properly called fiduciaries. *See Faulkenbury v. Teachers' and State Employees' Retirement System*, 108 N.C. App. 357, 373, 424 S.E.2d 420, 428 (1993).

Ducker, Boyles, and the individual members of the Board of Trustees of the North Carolina Local Governmental Employees' Retirement System, in their official capacities, from enforcing the earnings limitation as to Kestler. In its opinion, the District Court concluded that the remaining defendants below -- the State of North Carolina and the North Carolina Local Governmental Employees' Retirement System -- were not "persons" subject to suit under 42 U.S.C. § 1983 (Petition A.22-A.23). The District Court also concluded that, while the Board of Trustees itself was not subject to suit, Kestler's complaint amounted to a suit against the individual members of the Board in their official capacity, making the individual members parties to this action (Petition A.24).

Defendants Ducker, Boyles, and Board of Trustees (hereinafter referred to, for the sake of clarity, simply as "defendants") appealed the decision of the District Court to the United States Court of Appeals for the Fourth Circuit. A divided panel of the Court of Appeals, by a decision reported at 48 F.3d 800 (1995) (Petition A.1-A.11), reversed the District Court and remanded the matter for dismissal of the complaint. The same divided panel denied Kestler's petition for rehearing, and the Fourth Circuit rejected Kestler's suggestion for rehearing *en banc* (Petition A.12-A.13).

B. Factual Background.

Defendants agree with Kestler's statement of the facts, except to the extent that his statement suggests that N.C. GEN. STAT. § 128-35 (*quoted at* Petition 2-3) obligates defendants to pay his disability retirement benefits without regard to the earnings limitation. By its own terms, N.C.

GEN. STAT. § 128-35 limits the North Carolina Local Governmental Employees' Retirement System's obligations to "pensions, annuities, retirement allowances, refunds and other benefits *granted under the provisions of this Article* [N.C. GEN. STAT. Chapter 128, Article 3, which creates and governs the Retirement System]" (emphasis added). Accordingly, N.C. GEN. STAT. § 128-35 itself confers no contractual rights.

REASONS WHY THE PETITION SHOULD BE DENIED

I. KESTLER HAS FAILED TO ESTABLISH THAT APPROPRIATE GROUNDS FOR GRANTING A PETITION FOR WRIT OF CERTIORARI EXIST IN THIS CASE.

In his petition, Kestler urges that a writ of certiorari should be granted because "the Fourth Circuit Court of Appeals decided a federal constitutional question of impairment by state statute of petitioner's retirement contract in a manner contrary to the court of last resort of the State of North Carolina" (Petition 5). By phrasing the issue in this way, it would appear that Kestler is attempting to bring his petition within the guidelines of Rule 10.1(a) of the Rules of the Supreme Court. Rule 10.1(a) provides that a writ of certiorari may be appropriate when a United States court of appeals "has decided a federal question in a way in conflict with a state court of last resort." By his petition, however, Kestler is not actually asking the Court to review a federal question. The issue that he presents is totally a question of North Carolina law.

Kestler alleges that his vested contractual rights have been impaired by defendants in violation of the Contract Clause, U.S. CONST., art. I, § 10, para. 1. As noted by the Fourth Circuit, "the issue of whether a contract right exists is governed by state law, while federal law governs a determination that a contract has been impaired under the Contract Clause." *Kestler v. Board of Trustees of the North Carolina Local Governmental Employees' Retirement System*, 48 F.3d 800, 803 (CA4 1995) (Petition A.6). The majority, relying on *Griffin v. Board of Commissioners of Law Enforcement Officers' Benefit and Retirement Fund*, 84 N.C. App. 443, 352 S.E.2d 882 (App., *infra*, 1a-5a), *appeal dismissed and pet. for disc. rev. denied*, 319 N.C. 672, 356 S.E.2d 776 (1987) (App., *infra*, 7a), determined that under North Carolina law, Kestler had no vested contractual right to receive disability retirement benefits free of any earnings limitation. Kestler contends that the majority should have relied on *Simpson v. Local Governmental Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987) (App., *infra*, 9a-21a), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988) (App., *infra*, 23a-24a), in reaching its decision. It is the Fourth Circuit's interpretation and application of North Carolina law, then, and not the Fourth Circuit's disposition of a federal question, that Kestler seeks to have this Court review.

The Fourth Circuit considered Kestler's arguments carefully and thoroughly. Eight paragraphs and one long footnote, covering approximately four pages of an eight-and-one-half page majority opinion, are devoted to *Griffin*, *Simpson*, and a detailed analysis of which precedent is controlling in this case. *Kestler*, 48 F.3d at 803-804 (Petition A.6-A.9). The majority ultimately decided that,

"[w]hile the principles involved in *Griffin* and *Simpson* are similar, they are not the same. Neither is there any inference in *Simpson* that it overrules *Griffin*, clear or impelling or otherwise." *Kestler*, 48 F.3d at 804 (Petition A.9).

Kestler now asks this Court to decide whether the North Carolina Supreme Court or the North Carolina Court of Appeals has overruled *Griffin*. This is purely a question of state, not federal, law. Historically, this Court has been understandably reluctant to undertake such reviews. In *Butner v. United States*, 440 U.S. 48 (1979), Justice Stevens, speaking for the Court, stated:

> In this Court the parties have argued the state-law question at great length, each stressing different aspects of the record. We decline to review the state-law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.

Id. at 57-58 (footnote omitted). *See also The Tungus v. Skovgaard*, 358 U.S. 588, 596 (1959) (in the absence of definitive statutory interpretation from state courts, the Court deferred to the Third Circuit's interpretation of New Jersey statute); *United New York & New Jersey Pilots Assn. v. Halecki*, 358 U.S. 613, 615 (1959) (same).

Because Kestler is seeking to have the Court determine a question of North Carolina law, his petition for writ of certiorari lacks appropriate grounds and should be denied.

II. THE COURT OF APPEALS FOR THE FOURTH CIRCUIT PROPERLY APPLIED NORTH CAROLINA CASE LAW IN ITS DECISION.

Kestler argues that the majority below mistakenly relied on the decision of the North Carolina Court of Appeals in *Griffin v. Board of Commissioners of Law Enforcement Officers' Benefit and Retirement Fund*, 84 N.C. App. 443, 352 S.E.2d 882 (App., *infra*, 1a-5a), *appeal dismissed and pet. for disc. rev. denied*, 319 N.C. 672, 356 S.E.2d 776 (1987) (App., *infra*, 7a). He contends that in deciding this case, the court was bound by the decision of the North Carolina Court of Appeals, affirmed in a *per curiam* decision by the North Carolina Supreme Court, in *Simpson v. Local Governmental Employees' Retirement System*, 88 N.C. App. 218, 363 S.E.2d 90 (1987) (App., *infra*, 9a-21a), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988) (App., *infra*, 23a-24a). Kestler's position in this regard is inaccurate, however, because the Fourth Circuit properly interpreted and applied the law of North Carolina.

Kestler makes numerous arguments that *Griffin* has been overruled by implication, that it has never been cited again as precedent, and that *Simpson*, through a *per curiam* affirmance, was a North Carolina Supreme Court decision, while *Griffin* was only a North Carolina Court of Appeals decision. Accordingly, he contends that *Simpson*, not *Griffin*, is controlling in this case. In making these arguments, Kestler ignores, and asks the Court to ignore, established principles of North Carolina law.

By its decision in *Simpson*, the North Carolina Court of Appeals did not overrule *Griffin*; indeed, it could not have done so. This is so for two reasons. First, as noted by the

court below, *Kestler*, 48 F.3d at 804 (Petition A.8-A.9), overruling by implication is highly disfavored in North Carolina. *See Cole v. Cole*, 229 N.C. 757, 51 S.E.2d 491 (1949). More to the point, however, is the fact that one panel of the North Carolina Court of Appeals lacks the authority to overrule the decision of another panel of that court.

In *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989), the North Carolina Supreme Court specifically held that "a panel of the Court of Appeals is bound by a prior decision of another panel of the same court addressing the same question, but in a different case, unless overturned by an intervening decision from a higher court." *Id.*, 324 N.C. at 384, 379 S.E.2d at 37. This being the law in North Carolina, the panel of the Court of Appeals that decided *Simpson* was simply without authority to overrule the decision in *Griffin*. The *Griffin* and *Simpson* decisions are properly read, then, as the court below read them -- as two cases, both of which retain value as precedent, that deal with quite similar but ultimately distinguishable issues. *Kestler*, 48 F.3d at 804 (Petition A.9).

Nor does the decision of the North Carolina Supreme Court affirming *per curiam* the holding of the Court of Appeals in *Simpson* change the fact that *Simpson* did not overrule *Griffin*. While it is true that a *per curiam* opinion has the same precedential value as a full opinion rendered by the North Carolina Supreme Court, *see Bigham v. Foor*, 201 N.C. 14, 15, 158 S.E. 548, 549 (1931), it is also true that a *per curiam* affirmance does nothing but affirm, without comment, the holding of the North Carolina Court of

Appeals. In other words, the North Carolina Supreme Court does not add to or even comment upon the opinion of the Court of Appeals in a *per curiam* decision; it simply adopts as its own the disposition of the case made by the Court of Appeals. Accordingly, if the North Carolina Court of Appeals did not overrule *Griffin* in its *Simpson* decision (which, according to *In the Matter of Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37, it lacked the authority to do), then neither did the North Carolina Supreme Court overrule *Griffin* in its *per curiam Simpson* affirmance.

Moreover, the court below correctly determined that *Griffin* and *Simpson* addressed similar but distinguishable issues. A cursory reading of the Court of Appeals' opinion in *Simpson* (App. 7a-19a) shows that the court was considering a legislative alteration of the statutory formula used to calculate disability benefits. (*See* App. 11a-13a) The statute at issue in this case, the earnings limitation imposed by 1979 N.C. Sess. Laws (2nd. Sess. 1980) 1215 (Petition A.50-A.51), was never at issue in *Simpson*. Moreover, the contractual "right" claimed by the *Simpson* plaintiffs was a "right" conferred by statute, not by administrative regulation as in this case. Simply put, the issue raised by Kestler in this case was not before the North Carolina courts in *Simpson*.

On the other hand, the statute at issue in this case is the same statute that was at issue in *Griffin*. In *Griffin*, the plaintiff, a member of the former Law Enforcement Officers' Benefit and Retirement Fund like Kestler, alleged that the imposition of the earnings limitation brought about by 1979 N.C. Sess. Laws (2nd. Sess. 1980) 1215, did "not apply to him because his retirement rights had vested before those

provisions were enacted, and that if the provisions [were] interpreted to affect his benefits they are unconstitutional." *Id.* at 444, 352 S.E.2d at 883 (App., *infra*, 2a). The North Carolina Court of Appeals rejected this argument, holding that the plaintiff had no right to be free from the earnings limitation because the earnings limitation was in effect at the time that he actually retired on disability. "Thus, we see no basis for plaintiff's argument that applying the act to him violates his constitutional rights." *Id.* at 445, 352 S.E.2d at 884 (App., *infra*, 4a). Moreover, as the Fourth Circuit specifically noted, the record in *Griffin* establishes that the North Carolina Court of Appeals was in fact presented with arguments from the plaintiff concerning violations of the Contract Clause, enabling the Fourth Circuit to note that "the court in *Griffin* was presented with very nearly the precise factual circumstances with which we are faced in the instant case." *Kestler*, 48 F.3d at 804, n.6 (Petition A.8).

Accordingly, in *Griffin*, unlike in *Simpson*, the North Carolina Court of Appeals dealt with the identical issue raised by Kestler in this action and resolved that issue against him. In essence, as the court below determined, the North Carolina Court of Appeals held that the contractual right at issue in *Simpson* vested after a member completed five years of membership service, while the claimed contractual right at issue in *Griffin* vested only at the time of retirement. The issues are distinguishable, and the cases deciding them, therefore, are also distinguishable.

Because the Fourth Circuit properly applied North Carolina law in its decision, Kestler's petition for writ of certiorari should be denied.

III. THE POSSIBLE PRECEDENTIAL EFFECT OF THE FOURTH CIRCUIT'S DECISION DOES NOT WARRANT THE GRANTING OF A PETITION FOR WRIT OF CERTIORARI.

As his final argument, Kestler contends that the disposition of issues in a number of pending cases may be "adversely affected by the Fourth Circuit's decision to follow *Griffin* rather than *Simpson*" (Petition 18). This argument falls far short of showing that a writ of certiorari is appropriate in this matter.

Defendants initially note that a similar argument could be made regarding almost any decision of any appellate court. That is, most published decisions of appellate courts have the potential of influencing decisions of other courts in cases where the same or similar issues are presented. Moreover, whether the Fourth Circuit's decision in this case will "adversely affect" the outcome of the other cases listed by Kestler is purely a matter of perspective; defendants could just as easily have made the same argument had the court below held in favor of Kestler.

Only one of the cases cited by Kestler -- *LaBroad v. The Teachers' and State Employees' Retirement System*, 3:94CV210McK (W.D.N.C.) -- involves the same statute at issue in this case. That federal case, of course, will be directly affected by any decision of the Fourth Circuit. The remaining cases all involve other statutes; most involve the same legislative change to the disability retirement formula that was at issue in *Simpson*. Defendants submit that the courts before which these cases are currently pending or to which they may be appealed are quite capable of undertaking

a thorough analysis such as the one engaged in by the Fourth Circuit in this case to determine the proper law to apply.

Notably, five of the eight cases listed by Kestler are pending in the state courts of North Carolina. While the courts deciding those cases will undoubtedly give due consideration to the opinion of the Fourth Circuit, it is well established in North Carolina that a federal court's interpretation of state law, while instructive, is not binding on the state courts of North Carolina. *See, e.g., Huggard v. Wake County Hospital System*, 102 N.C. App. 772, 775, 403 S.E.2d 568, 570 (1991). A different holding upon review by this Court, then, would not in any way change the fact that the courts of North Carolina could and would conduct independent reviews in determining the precedential significance of *Griffin* and *Simpson*.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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MARVIN W. GRIFFIN v. THE BOARD OF COMMISSIONERS OF THE LAW ENFORCEMENT OFFICERS' BENEFIT AND RETIREMENT FUND

No. 8626SC521

North Carolina Court of Appeals

Filed 17 February 1987

[84 N.C. App. 443, 352 S.E.2d 882]

Pensions § 1 - disability retiree employed - reduction in benefits - statute applicable to plaintiff

A 1980 amendment to N.C.G.S. § 143-166(y) which required defendant to determine whether disability retirees were gainfully employed and to reduce the benefits of those who were under a schedule which was set forth applied to plaintiff whose retirement became effective 1 September 1981, and there was no merit to plaintiffs argument that he was eligible to retire on disability earlier than he did and that he therefore should not have been subjected to the terms of the statute.

APPEAL by plaintiff from *Saunders, Chase B., Judge*. Judgment entered 10 January 1986 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 15 October 1986.

Boyle, Alexander, Hord and Smith, by Norman A. Smith, for plaintiff appellant.

Attorney General Thornburg, by Assistant Attorney General Norma S. Harrell, for defendant appellee.

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PHILLIPS, Judge.

In September 1981 plaintiff, a retired Mecklenburg County law enforcement officer, began receiving disability

retirement payments from the Law Enforcement Officers' Benefit and Retirement Fund established by G.S. 143-166, *et seq*. Because he had certain other earnings during 1982, in April 1983 defendant demanded, under the authority of G.S. 143-166(y), that plaintiff return a certain amount of the money that he received from the fund that year. Plaintiff paid the sum demanded under protest and brought this suit to recover it. In the complaint he alleged only that the provisions of G.S. 143-166(y) relied upon by defendant do not apply to him because his retirement rights had vested before those provisions were enacted, and that if the provisions are interpreted to affect his benefits they are unconstitutional. Judge Saunders overruled both contentions after hearing the matter on stipulated facts, the most pertinent of which follow:

Before 1980 G.S. 143-166, *et seq.*, the statutes governing the Law Enforcement Officers' Benefit and Retirement Fund, contained no provision reducing the benefits of disability retirees because they worked and earned other monies. In February 1979 while on duty as a Mecklenburg County police officer plaintiff fell and sustained an injury to his shoulder. Though he returned to work on 21 March 1979 he continued to have problems with the injured shoulder, and was unable to work at various times thereafter because of it. On 1 March 1980 his shoulder required surgery and he was not able to work until 26 September 1980 when he returned to light duty as a dispatcher. About 16 December 1980 plaintiff's shoulder was operated on again and he has not worked as a law enforcement officer since then, either on light or regular duty. During the months following this latter surgery plaintiff's shoulder did not materially improve and he was examined by his doctor

several times, one of which was on 4 June 1981. At that time he and the doctor discussed as possibilities plaintiff either retiring as disabled or of undergoing another operation, and the doctor told him they would discuss the matter further the next time he was examined. When plaintiff went to the doctor on 9 July 1981 the shoulder was still not functioning properly and he told the doctor he had applied for disability retirement on 15 June 1981 and the doctor said he would agree to it. In the application, later supported by a certificate from the

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doctor that plaintiff was disabled because of the injured shoulder, plaintiff requested that his retirement be effective 1 September 1981. In due course the application was approved as submitted and plaintiff was so notified by a letter from the fund dated 11 September 1981. The letter also stated that the fund's medical board was of the opinion that his condition could improve to the point of him being able to again perform the duties of a law enforcement officer, and that his status would be re-evaluated a year later. In the meantime, on 24 June 1980, the General Assembly amended G.S. 143-166(y) to require the defendant board to determine whether disability retirees were gainfully employed and to reduce the benefits of those that were under a schedule that was set forth and that is not in dispute. The act became "effective on July 1, 1980, for employees retiring on or after July 1, 1980," but for employees retiring prior to July 1, 1980, it became effective on July 1, 1981. The statute was further amended on the 8th day of October 1981, effective upon ratification, to make it applicable only to those disability beneficiaries "who retired after July 1, 1981."

Quite plainly, it seems to us, the judgment appealed from was correct and we affirm it. Contrary to plaintiff's

argument, G.S. 143-166(y) as amended cannot be properly interpreted as not applying to him. The enactment is not ambiguous; its application is expressly determined by the retirement date of each employee involved and the date of plaintiff's retirement clearly subjected him to the terms of the act. Plaintiff's argument, that he was permanently disabled almost from the time of his injury, and thus eligible to retire on disability earlier than he did, is unavailing. Under the statute his rights were established not by his condition at a certain time, which is debatable, but by the date of his retirement, which is not. Thus, we see no basis for plaintiff's argument that applying the act to him violates his constitutional rights. The legislation that first reduced the benefits of future disability retirees who work and earn money was enacted in 1980, more than a year before plaintiff retired, and we know of no authority for the proposition that plaintiff's retirement rights vested before then. The decisions that plaintiff relies upon involved employees whose benefits were reduced *after* their retirement, which is not plaintiff's situation, and a discussion of those authorities would serve no purpose. Nor was plaintiff adversely affected by the second

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amendment to G.S. 143-166(y), enacted after his retirement. The first amendment to G.S. 143-166(y) which, under the conditions above stated, reduced the benefits of law enforcement officers who retired on disability after July 1, 1980 was still in effect when plaintiff retired on September 1, 1981; and the later amendment did only two things, neither of which is constitutionally impermissible. It continued his status established by the prior enactment as a retiree that was accountable for his future earnings and it

increased the amount of money that plaintiff could earn without penalty.

Affirmed.

Judges PARKER and COZORT concur.

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GRIFFIN v. BD. OF COM'RS OF LAW OFFICERS' RETIREMENT FUND

No. 143P87.

Case below: 84 N.C. App. 443

[319 N.C. 672, 356 S.E.2d 776 (1987)]

Petition by plaintiff for discretionary review pursuant to G.S. 7A-31 denied 2 June 1987. Motion by defendant to dismiss appeal for lack of substantial constitutional question allowed 2 June 1987.

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JESSE R. SIMPSON, RICHARD D. MOORE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; E. T. BARNES, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND THE STATE OF NORTH CAROLINA

No. 8710SC400

North Carolina Court of Appeals

Filed 22 December 1987

[88 N.C. App. 218, 363 S.E.2d 90]

1. Retirement Systems § 2 - relationship between retirees and system contractual

The relationship between plaintiffs, who were former firemen who qualified for disability benefits, and defendant Retirement System was one of contract, since (1) the retirement benefits were deferred compensation, already in effect earned, merely transubstantiate over time into a

retirement allowance; and (2) fundamental fairness dictated such an interpretation.

2. Constitutional Law § 25.1; Retirement Systems § 2 - impairment of pension rights - reasonableness not determined - violation of contract clause of U.S. Constitution not determined

States may impair contracts in the exercise of their police power in order to protect the general interests of the commonwealth; therefore, even if N.C.G.S. § 128-27(d4) did impair plaintiffs' pension rights, it did not necessarily violate the contract clause of the U.S. Constitution, U.S. Const. art. 1, § 10, cl. 1, since the trial court made no determination as to whether the impairment was reasonable and necessary to serve an important public purpose.

APPEAL by plaintiffs from *Farmer, Robert L., Judge*. Order entered 9 October 1986 in WAKE County Superior Court. Heard in the Court of Appeals 28 October 1987.
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On 1 July 1985 plaintiffs filed a petition and complaint in Wake County Superior Court against defendants seeking, inter alia, to have N.C. Gen. Stat. § 128-27(d4) declared unconstitutional, to have their action certified as a class action, and an order requiring defendants to pay plaintiffs all past, present, and future benefits to which they are entitled. The challenged statute fixes the method of calculating disability benefits under the North Carolina Local

Governmental Employees' Retirement System on and after 1 July 1982. On 9 July 1986 plaintiffs moved for partial summary judgment, and on 8 September 1986 defendants responded, opposing plaintiffs' motion and moving for summary judgment on their own behalf. The trial court examined the supporting documents, heard oral arguments, found no genuine issue of material fact, and allowed defendants' motion. Plaintiffs appealed.

Daniels & Daniels, P.A., by Marvin Schiller, for plaintiff-appellants.

Attorney General Lacy H. Thornburg, by Norma S. Harrell, Assistant Attorney General, for defendant-appellees.

WELLS, Judge.

The question presented is whether the pension rights of vested members of the North Carolina Local Governmental Employees' Retirement System (Retirement System) may be made subject to adverse legislative modification without violation of U.S. Const. art. 1, § 10, cl. 1, prohibiting states from enacting any law "impairing the Obligation of Contracts." This is a case of first impression in North Carolina. [fn1]

The facts are not in dispute. Both plaintiffs are former firemen for the City of Greensboro who have qualified for disability benefits under the Retirement System. Mr. Simpson became a vested member [fn2] of the Retirement System by 6 August 1969 and

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qualified for disability benefits on 1 March 1983. Mr. Moore became a vested member of the Retirement System by 16 July 1978 and qualified for disability benefits on 1 January

1984. Under N.C. Gen. Stat. § 128-27(d3), which was in force from 1 July 1971 through 30 June 1982, a member of the Retirement System retiring on disability received a benefit calculated as if he had worked to the age of 65 years. Further, members whose creditable service began prior to 1 July 1971, like plaintiffs in the present case, received no less than the allowance provided by prior law, G.S. § 128-27(d2).

On 9 October 1981, the General Assembly modified, effective 1 July 1982, Chapter 128 by adding G.S. § 128-27(d4), which provides as follows:

> (d4) Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982. - Upon retirement for disability, in accordance with subsection (c) of this section on or after July 1, 1982, a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disability retirement and the creditable service he would have had had he continued in service until the earliest date on which he would have qualified for an unreduced service retirement allowance.

Thus, under the amended statute a member of the Retirement System retiring on or after 1 July 1982 receives either an unreduced service retirement allowance or an allowance calculated as if he had worked to the earliest date on which he would have been eligible for an unreduced benefit,

basically either 30 years or age 65. This means that a member beginning creditable service at, for example, age 20, can no longer, upon disablement after vesting, receive a benefit calculated as if he had worked 45 years. Instead, he may claim no more service credit years than a person retiring on service retirement after a full career of 30 years. Obviously, members such as plaintiffs herein who began work prior to age 35, and/or members who can claim additional service credits such as military service, stand to receive, upon disablement after vesting, a smaller retirement allowance under the modified statute than under prior law. Mr. Moore presently
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receives $564.88 per month as his retirement benefit, whereas he would have received $717.08 under the prior statute. Mr. Simpson now receives $801.91 monthly, whereas under the antecedent statute his allowance would have been $1,182.82. The gravamen of plaintiffs' complaint is that they are entitled to have their disability retirement benefits calculated according to the more favorable formula in effect at the time they became vested members of the Retirement System.

Plaintiffs contend that an adverse change in the benefit structure after vesting constitutes an impairment of contractual rights. In response, defendants contend, first, that North Carolina case law either does not support plaintiffs' position, or controverts it, as in *Griffin v. Bd. of Com'rs. of Law Officers' Retirement Fund*, 84 N.C. App. 443, 352 S.E.2d 882, *disc. rev. denied* 319 N.C. 672, 356 S.E.2d 776 (1987). Defendants claim *Griffin* stands for the proposition that the General Assembly can make changes in the disability retirement structure and apply those changes to members

with vested rights who have not yet retired on disability retirement at the time the changes came into force.

Defendants further point out that the General Assembly has expressly retained, per G.S. § 128-38, "the right at any time and from time to time . . . to modify or amend in whole or in part any or all of the provisions of the North Carolina Local Governmental Employees' Retirement System." Finally, defendants contend that even if the relationship between the Retirement System and plaintiffs is one of contract, and even assuming an impairment by virtue of the 1981 amendment, the impairment is nevertheless lawful because it is reasonable and necessary to serve an important public purpose.

We have looked to the case law of other jurisdictions to find guidance in deciding this difficult case and have encountered a kaleidoscope of multifarious and conflicting views. *See, e.g.*, Annot., 52 A.L.R. 2d 437 (1957). In a few states, the issue has been removed from the courts' province by constitutional amendment or by statutory enactment expressly providing that public employee pension plans give rise to contractual rights. Most of those courts which have confronted the question presented by this case, or questions similar to the one presented here, have adopted one of five approaches, which we review briefly below.
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First, a few jurisdictions still follow the traditional common law in holding that public employee pensions are gratuities creating no contractual rights until the member satisfies all his retirement requirements. According to this view, such pension benefits are mere expectancies, modifiable or revocable at the whim of the legislature. For

examples of such cases *see, e.g., Etherton v. Wyatt*, 155 Ind. App. 440, 293 N.E.2d 43 (1973) and *Creps v. Bd. of Firemen's Relief & Retirement Fund Trustees*, 456 S.W.2d 434 (Tex. 1970).

Apparently, a majority of courts have in recent years abandoned the common law gratuity theory in favor of an approach which accords more protection to such pension rights. The Minnesota case *Christensen v. Mpls. Mun. Emp. Retire. Bd.*, 331 N.W. 2d 740 (Minn. 1983) represents the second approach reviewed here. In this case, the Supreme Court of Minnesota declared that "a public employee's interest in a pension is best characterized in terms of promissory estoppel." The court went on to imply in law a contract to enforce the state's promise of pension benefits that had been reasonably relied upon.

Third, a large number of states have construed public pension plans as giving rise to contractual rights - even in the absence of a clear statement of legislative intent to contract. *See Pineman v. Oechslin*, 494 F. Supp. 525 (D. Conn. 1980), for cases cited therein. Some of these states have held that such pension rights vest unconditionally at the moment of employment. *See, e.g., Yeazell v. Copins*, 98 Ariz. 109, 402 P.2d 541 (1965). Other states follow the so-called California rule according to which such pension rights, though contractual, may be modified by the legislature where necessary and reasonable, provided that any disadvantages to employees are offset by comparable new advantages. *See, e.g., Allen v. Bd. of Admin.*, 34 Cal. 3d 114, 192 Cal. Rptr. 762, 665 P.2d 534 (1983). Courts have generally been more likely to find vested contractual rights arising out of voluntary plans than out of mandatory ones and, further,

have generally shown themselves more solicitous of employees who have already retired than of those who have not. *See* Annot., 52 A.L.R. 2d, *supra*, at 441-43.

Fourth, at least two jurisdictions, however, have stubbornly rejected the contractual approach. In *Spina v. Consol. Police &*
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Firemen's Pension Fund Comm'n, 41 N.J. 391, 197 A.2d 169 (1964), the Supreme Court of New Jersey held, in an opinion authored by Chief Justice Weintraub, that the provisions of a pension plan, like other terms and conditions of public service employment, "rest in legislative policy rather than contractual obligation, and hence may be changed except of course insofar as the State Constitution specifically provides otherwise." The court stated that legislative acts do not give rise to contractual rights abridging the power of succeeding legislatures to make revisions for the good of all unless the statute "expressly calls for the execution of a written contract or confirms a settlement of a dispute." The Supreme Court of Connecticut has recently embraced the Spina approach in *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803 (1985). The Connecticut court conceded a "seductive appeal in the contract-oriented approaches" but refused to find that a statute gives rise to contractual rights absent an unmistakable expression of legislative intent to contract. The court summed up as follows:

> Upon examination of the case law in this area, it becomes clear that the contract approach plays havoc with basic principles of contract law, traditional contract clause analysis and, most importantly, the fundamental legislative prerogative to reserve to itself the implicit

power of statutory amendment and modification.

[1] After having carefully considered both relevant North Carolina case law and the relative merits and weaknesses of the four approaches reviewed above, we have decided to hold that the relationship between plaintiffs and the Retirement System is one of contract. Our Supreme Court held in *Bridges v. Charlotte*, 221 N.C. 472, 20 S.E.2d 825 (1942) that the retirement benefits received by state employees from the retirement fund there challenged were payments of salary for services rendered. Twenty years later, in *Insurance Co. v. Johnson, Comm'r of Revenue*, 257 N.C. 367, 126 S.E.2d 92 (1962), our Supreme Court stated: "A pension paid a governmental employee . . . is a deferred portion of the compensation earned for services rendered." If a pension is but deferred compensation, already in effect earned, merely transubstantiated over time into a retirement allowance, then an employee has contractual rights to it. The agreement to defer the

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compensation is the contract. Fundamental fairness also dictates this result. A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

[2] But to hold that Article 3 of G.S. § 128 gives rise to contractual rights does not dispose of the question presented.

As *Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353 (D. Md. 1984) explains, a state does not automatically run afoul of the Contract Clause of the U.S. Constitution by impairing pension rights. In *Hughes*, which represents the fifth and final approach reviewed here, a class of public schoolteachers and other state employees brought suit alleging that Maryland's 1984 "Pension Reform Act" violated the Contract Clause of the U.S. Constitution. Relying on U.S. Supreme Court Contract Clause jurisprudence, the *Hughes* court held that to the extent, if any, the challenged Act had impaired purported contract rights, the impairment was constitutional because it was reasonable and necessary to serve an important public purpose. We adopt the *Hughes* approach because it accords some protection to plaintiffs' pension rights without substantially derogating from the General Assembly's prerogatives.

To be sure, on its face the Contract Clause of the U.S. Constitution absolutely prohibits states from impairing contractual obligations. However, the Supreme Court has recognized that states may impair contracts in the exercise of their police power in order to protect the general interests of the commonwealth. [fn3] In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court established a tripartite test for deciding cases involving alleged Contract Clause infringements when a state is a

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party to the contract. [fn4] The reviewing court must first ascertain whether a contractual obligation arose under the statute. Second, the court must determine if the state's actions impaired an obligation of the state's contract. Third, the court must determine whether the impairment, if any, was "reasonable and necessary to serve an important public purpose."

We have held, *supra*, that Article 3 of Chapter 128 of the North Carolina General Statutes creates contractual obligations. We also find that rights arising under this statute were impaired inasmuch as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge. But we conclude that the question of whether the amendment at issue is violative of the Contract Clause because it is reasonable and necessary to serve an important state interest has not been properly resolved in the court below.

Mr. E. T. Barnes, Deputy Treasurer and Director of the Retirement Systems Division of the North Carolina Department of State Treasurer, has elaborated the State's interest in the challenged amendment in his affidavit contained in the Record from which we quote the following pertinent part:

> From the Retirement System's standpoint, an unreduced retirement, or one normally based on 30 years or age 65, is a full career. Prior to the amendment to the disability retirement provisions in 1982, between 15 and 20% of our retirements had become disability retirements. A significant number of those were coming in the later years for people who were already eligible to retire on service retirement and, in all probability, would have been contemplating service retirement anyway. The possibility of disability retirement appeared to be a device by which people were able to improve their retirement allowances because of the relatively frequent types of health problems which

appear in later years. There seemed to be little justification for allowing a disability to be extended as if the person had worked until

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age 65 while another person, with the same service, would be considered to have retired at a normal career retirement point.

Mr. Barnes' affidavit shows that the changes in the System's disability retirement requirements challenged by plaintiffs were made primarily to correct inequities in the System. We are not persuaded that this explanation demonstrates or reflects that these changes were reasonable *and necessary* to serve an important state interest. We perceive that defendants' burden to show that there are no genuine issues as to any material fact in this action and that defendants are entitled to judgment as a matter of law has not been met. *See* N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure. Accordingly, we hold that summary judgment for defendants was improvidently entered and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

[fn1] In the case *Harrell v. Retirement System*, 271 N.C. 357, 156 S.E.2d 702 (1967) our Supreme Court stated as follows: "We find it unnecessary to determine on this record to what extent, if any, plaintiffs' rights to their retirement allowances became vested so that the General Assembly could not by legislation constitutionally impair such rights."

[fn2] In North Carolina the right of members of the Retirement System to retirement benefits vests after five years of creditable service. *See* G.S. § 128-27(a)(1) and (c).

[fn3] *See, e.g., Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934). *See generally* B. Schwartz, A Commentary on the Constitution of the United States, Part II: The Rights of Property 266-306 (1965).

[fn4] Where the contract is between private parties the test is somewhat different. *See* United States Trust at 25. *See generally* Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1623 (1980); Note, Rediscovering the Contract Clause, 97 Harv. L. Rev. 1414 (1984).

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JESSE R. SIMPSON, RICHARD D. MOORE, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED v. NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; E. T. BARNES, DIRECTOR OF THE RETIREMENT SYSTEM DIVISIONS AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENT EMPLOYEES' RETIREMENT SYSTEM (IN HIS OFFICIAL CAPACITY); AND THE STATE OF NORTH CAROLINA

No. 2A88

Supreme Court of North Carolina

Filed 6 October 1988

[323 N.C. 362, 372 S.E.2d 559]

APPEAL by defendants pursuant to N.C.G.S. § 7A-30(1) from a decision of the Court of Appeals, 88 N.C. App. 218, 363 S.E.2d 90 (1987), which reversed summary judgment for defendants entered at the 6 October 1986 Session of Superior Court, WAKE County, *Farmer, J.*, presiding, and remanded for further proceedings consistent with the opinion. Heard in the Supreme Court on 13 September 1988.

Anderson, Schiller & Rutherford, P.A., by Marvin Schiller, for plaintiff appellees.

Lacy H. Thornburg, Attorney General, by Norma S. Harrell, Assistant Attorney General, for defendant appellants.

PER CURIAM.

Affirmed.